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SUPREME COURT, U.S.
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No. 03-1011

IN THE

Supreme Court of the United States

MANATEE COUNTY,

Petitioner,

v.

PEEK-A-BOO LOUNGE OF BRADENTON, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Eleventh Circuit held – in accordance with this Court's decision in *City of Los Angeles v. Alameda Books, Inc.* – that when there is conflicting evidence on whether a government restriction on First Amendment activities is adequately supported by an evidentiary record, summary judgment is inappropriate. The Court also reaffirmed that such an ordinance cannot survive a constitutional challenge when there is no evidence – either pre-enactment or post-enactment – to support it. The Questions Presented are:

I. WHETHER A LOCAL ORDINANCE THAT IMPOSES RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES IS VALID WHEN ABSOLUTELY NO PRE-ENACTMENT OR POST-ENACTMENT EVIDENCE WAS PRESENTED TO SUPPORT THE ASSERTED INTEREST PROPOSED BY THE GOVERNMENT AS THE REASON FOR ITS ENACTMENT.

II. WHETHER IT WAS IMPROPER FOR THE COURT OF APPEALS TO REMAND THIS CASE FOR TRIAL, TO ALLOW RESPONDENTS THE OPPORTUNITY TO CASE DOUBT ON THE EVIDENCE PRESENTED BY THE GOVERNMENT TO SUPPORT ITS CLAIM THAT ITS ORDINANCE ADVANCED A SUBSTANTIAL GOVERNMENTAL INTEREST, OR THE RELEVANCE OF THAT EVIDENCE TO THE INTEREST ASSERTED BY THE GOVERNMENT.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents' Counsel notifies the Court that Respondents Peek-A-Boo Lounge of Bradenton, Inc. and M.S. Entertainment, Inc. are each Florida for-profit corporations. Neither Respondent has any parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the Respondent corporations.

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STATEMENT OF THE CASE

There were two ordinances challenged below. The first – Ordinance 98-46 – was enacted in 1998, and amended the Manatee County Adult Entertainment Code. The amendment, described by the District Court as a "land use zoning regulation,"[1] established certain physical requirements for "adult dancing establishments."[2]

The following year, the County enacted a new ordinance – Ordinance 99-18 – that was not part of its Adult Entertainment Code. Ordinance 99-18 regulated public nudity. The ordinance prohibited nudity in public places, including the businesses of these Respondents, operators of the only two adult cabarets in the County. The Respondents sued to challenge both ordinances.

The United States District Court granted the County's Motion for Summary Judgment as to Ordinance 98-46, the zoning ordinance. Despite the fact that the County presented no pre-enactment or post-enactment evidence to support the Ordinance, the Court nonetheless said that ". . . evidence in support of and in opposition to the ordinance was submitted" during the public hearing in which Ordinance 98-46 was enacted.[3] The Court inexplicably made this statement in spite

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1. Appendix D to the Petition, at 53a.

2. An "adult dancing establishment," often referred to as an adult nightclub, is a business in which entertainers present dancing performances, in varying states of undress, for the entertainment of the patrons of the business. Ordinance 98-46 imposed requirements on adult dancing establishments for room size, lighting in customer areas, unlocked access to all customer areas and similar restrictions.

3. App. D, at 54a.

of the fact that no such evidence was ever before the County at any time. Apparently the District Court incorporated materials which were not presented during the adoption process into its consideration of Ordinance 98-46, materials that did not even exist at that time; those materials were presented a year later during the adoption process for Ordinance 99-18, an unrelated ordinance. Additionally, they were not even prepared or collected by the County, but were provided by a highly-biased private citizen, an executive officer of an organization opposed to all adult entertainment businesses.

The District Court also upheld Ordinance 99-18, and made a similar statement in regard to its enactment. The Court said – this time correctly – that during the hearing, "Evidence was submitted in support of and in opposition to the ordinance."[4] The County had presented what it claimed was adequate and relevant evidence with its Motion for Summary Judgment. The Respondents presented a significant quantity of evidence directly refuting the evidence that had been presented by the County. The Court resolved that factual dispute – as to the relevance and sufficiency of the evidence before the County when it passed Ordinance 99-18 – without allowing the parties the opportunity for an evidentiary hearing, when the evidence would have been tested for relevance and sufficiency.

The Eleventh Circuit reversed and remanded for further proceedings, including (we assume) the opportunity for the parties to examine and challenge the evidence presented by the other. As to Ordinance 98-46, the Court of Appeals correctly observed that the County had no evidence before it

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4. App. D at 55a.

at the time of enactment relevant to showing the County's asserted need for the ordinance. The Court also said that the District Court had no post-enactment evidence before it to support its conclusion that the evidence before the County was sufficient.[5] Based on the total lack of evidence, the panel concluded that the District Court's judgment finding Ordinance 98-46 constitutional was erroneous.

As to Ordinance 99-18, the Circuit Court found summary judgment inappropriate for resolving the factual dispute between the parties as to whether the County's supporting evidence was relevant to the asserted governmental interest, and whether that evidence was credible and reliable. It reversed the summary judgment upholding the ordinance.

In its opinion, the District Court made no mention of this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). However, the Circuit Court placed great reliance on that decision when it reversed the District Court.

The case comes to this Court now, on Petition by the County, "at a very early stage in this process." *Alameda Books*, 535 U.S. at 439. As to one ordinance, the Eleventh Circuit found absolutely no evidence in the record to support its enactment; as to the other, the Court found an evidentiary dispute that was not appropriate for resolution by summary judgment. There is no reason for this Court to enter the fray between these parties until there is an adequate evidentiary record *in this case* on which the trial court can base a decision.

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5. The Eleventh Circuit explained how the District Court had erroneously found sufficient evidence to support *both* ordinances. The District Court had simply treated both ordinances as a single enactment and considered the evidence presented to justify the 1999 ordinance as sufficient to support the 1998 enactment.

REASONS FOR DENYING THE PETITION

Manatee County wants this Court to intervene at this early stage of the litigation, before the District Court has the opportunity to resolve the evidentiary dispute between the parties at a trial on the merits. Respondents believe that review by this Court at this time is unnecessary and unwise. As Respondents have pointed out, this case is in the early stages of litigation. Following the filing of the Complaint and some preliminary matters, the County filed its motion for summary judgment, and attached the affidavits and evidence it believed would support each ordinance. The Respondents filed their memorandum in opposition, and attached affidavits and evidence challenging the County's presentation. The District Court ruled for the County, and the case moved on to the Court of Appeals.

Should this Court deny review at this stage, the case will go back to the trial court. At that time, as it has been directed to do by the Eleventh Circuit, the District Court will resolve the evidentiary dispute between the parties in a trial on the merits. While the case is in the District Court, that Court will apply the guidance of this Court in *Alameda Books*, and will render a final judgment in accord with that decision. In the meantime, it is far too early for this Court to review this case.

1. The interlocutory nature of the judgment below makes review in this Court both unwise and unnecessary.

For well over a century, this Court has carefully protected the use of its very limited time and resources to avoid involvement in interlocutory matters except in the most

unusual of cases. As the Court said in *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372 (1893), review by certiorari in this Court ". . . should be exercised sparingly and with great caution and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." 148 U.S. at 383. *See also* 508 U.S. 946 (1993) (Scalia, J., concurring). In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327 (1967), the Court declined to review a case by certiorari because the court of appeals had remanded the case to the district court for further proceedings.

Review in this Court is not warranted now. The Eleventh Circuit has sent this case back to the trial court, with instructions to "conduct further proceedings consistent with this opinion." At such time as the case becomes final in the District Court, one or more of the issues may have been resolved to the parties' satisfaction. A complete record will have been developed. The case will be ready for appellate review.[6] It is not ready today.

Respondents acknowledge some exceptions to the general practice that this Court does not review interlocutory proceedings. One exception is when the Court decides it is necessary to resolve a conflict among the federal circuits on an important issue of federal law, and the Court determines that early review is necessary. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945). Manatee County claims that there is a conflict among the circuits that is so

6. As Justice Stevens wrote in his dissent in *Estelle v. Gamble*, 429 U.S. 97 (1976), ". . . Likewise, if the decision of the Fifth Circuit . . . had been allowed to stand and the case had run its normal course, the litigation probably wold have come to an end without the need for review by this Court." 429 U.S. at 113 (Stevens, J. dissenting).

serious that review by this Court is urgently needed now. The County is wrong.

2. There is no conflict among the circuits on the distinction between pre-enactment and post-enactment evidence that requires this Court's intervention.

According to the County's Petition, there is a conflict among the federal circuits on both of the Questions it presents for review. The County's two Questions are: (1) "whether *pre-enactment* evidence of secondary effects is required to sustain a secondary effects ordinance;" and (2) "whether a challenge to a local government's secondary effects evidence transforms the question of legislative justification from a matter of law into an issue of triable fact."[7] While the Respondents disagree that these are actually questions to be resolved,[8] the Respondents do agree that if the decision of the Eleventh Circuit placed that circuit in conflict with other circuits, this Court *might* consider varying from its standard practice of not reviewing interlocutory decisions. But while the County claims that the very existence of a conflict creates a reason for granting the Petition, it fails to explain why review at this time is important. And a review of the "conflicts" argued by the County makes it clear that no review is necessary at this time.

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7. Petition at 11.

8. Respondents suggest that, as to the first question, the lack of both pre-enactment and post-enactment evidence makes it unnecessary for this Court to review the decision of the Eleventh Circuit as to Ordinance 98-46.

The County claims that the decision of the Eleventh Circuit is in conflict with a decision of this Court and decisions from other federal circuit courts on the issue of the need for pre-enactment evidence. According to the Petition, the Eleventh Circuit opinion is in conflict with this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The County claims that it is also in conflict with decisions from the "Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits."[9] Those decisions creating the alleged conflict are identified as: *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997) (en banc), *Chesapeake B & M v. Harford County*, 58 F.3d 1005 (4th Cir. 1995); *BGHA, LLC v. City of Universal City*, 340 F.3d 295 (5th Cir. 2003); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); and *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003).

Several of these cases need no discussion. *Alameda Books* defines the process by which a secondary effects ordinance is reviewed. But *Phillips*, *Chesapeake B & M* and *DiMa* were all decided long before *Alameda Books*. This Court has no need to review an alleged conflict with cases that were decided before this Court spoke in *Alameda Books*.[10] A review of the other decisions – *BHGA* and *Center for Fair Public Policy* – quickly reveals that there is a significant distinction between them and this case.

In *BHGA*, the City of Universal City, Texas adopted a licensing and zoning ordinance applicable to adult entertainment businesses. An adult cabaret, which would have

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9. Petition at 13.

10. Likewise, this Court's decision in *Barnes* preceded the decision in *Alameda Books*.

been forced to relocate, filed suit. The City presented the preamble to the ordinance, the minutes of the City Council meetings when the ordinance was considered and enacted, and several affidavits "of individuals directly involved in the study, development, and enactment of the Ordinance. . . ." 340 F.3d at 298. The cabaret argued that the affidavits were insufficient because they were not created until after the litigation was filed. However, the cabaret *never* challenged the substance of the affidavits. *Id.* at 399.

Amazingly, the opinion of the Fifth Circuit never mentioned *Alameda Books*, even though that case had been decided nearly two years earlier. Under an *Alameda Books* analysis, the decision of the Fifth Circuit was correct. As the plurality wrote in *Alameda Books*:

> . . . If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g., Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (plurality opinion). . . .

535 U.S. at 438-39. And as Justice Kennedy added in his concurring opinion: "If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." *Id.* at 453.

In *BHGA*, there was no need for a trial because Universal City presented limited pre-enactment and substantial post-enactment evidence with its motion for summary judgment that provided some support for its ordinance, and the cabaret *never challenged that evidence*. Without evidence before it that cast doubt on the city's evidence, the district court granted the city's motion.

In this case, there is an abundance of evidence from these Respondents that cast doubt on the pre-enactment and post-enactment evidence presented by the County to support Ordinance 99-18. The Eleventh Circuit simply found that with conflicting evidence, as both the plurality *and* Justice Kennedy wrote in *Alameda Books*, summary judgment is inappropriate and a trial on the merits is required. There is absolutely no conflict between *BHGA* and this case.

The other case cited by Manatee County as being in conflict with the opinion below is *Center for Fair Public Policy v. Maricopa County*. Again, there is no conflict that warrants the Petition in this case being granted.

Unlike the Fifth Circuit in *BHGA*, the Ninth Circuit panel did consider *Alameda Books* in its decision. Indeed, the very basis for the strong dissent by Judge Canby in the Court's 2-1 decision was his observation that the majority misread and misapplied Justice Kennedy's concurring opinion.[11] But there is a significant difference between *Center for Fair Public Policy* and this case. The instant case came to the

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11. Both the majority and the dissent in *Center for Fair Public Policy* agreed that Justice Kennedy's concurrence was the opinion of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977). They disagreed on what that concurrence said.

Eleventh Circuit following the grant of Manatee County's motion for summary judgment. *Center for Fair Public Policy* arrived at the Ninth Circuit as a final judgment.[12] In this case, the trial court now must resolve the evidentiary dispute between the parties, consistent with both the plurality and concurring opinions in *Alameda Books*. In *Center for Fair Public Policy*, there was nothing left for the trial court to do.

Manatee County asks this Court to grant review of the Eleventh Circuit decision now, without waiting for a complete record and a final judgment. In the enactment of Ordinance 99-18, the County *did* have evidence before it, and the Respondents *did* present evidence casting doubt on the County's evidence and rationale. A trial on the merits, resolving the evidentiary dispute, was exactly the result the plurality and concurring opinions in *Alameda Books* intended. There is no conflict between *Center for Fair Public Policy* and this case sufficient to warrant review by this Court until the case below becomes final.

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12. The Petitioners in *Center for Fair Public Policy* had applied to the trial court for a preliminary injunction. Before the issues were briefed, the Defendants placed 14 studies into the record, over the objections of those Petitioners that those studies had never been considered by the Arizona legislature when it enacted the statute. The preliminary injunction was denied, and that denial was affirmed by the Ninth Circuit in a memorandum opinion. *L.J. Concepts v. City of Phoenix*, 215 F.3d 1333 (9th Cir. 2000). After the case was remanded, the parties stipulated that the order denying a preliminary injunction would be treated as the final judgment in the case. No further evidentiary presentation was made. See Appendix D to the Petition for Writ of Certiorari in *Center for Fair Public Policy v. Maricopa County*, Docket Number 03-1107.

3. There is also no conflict among the federal circuits on the evidence needed to support a public nudity ordinance enforced in adult nightclubs that far exceeds ordinances previously found acceptable by this Court.

This Court should compare what actually occurred in the two cases cited by the County as being in conflict with the Eleventh Circuit's opinion and the conflict alleged by the County. In the very first sentence in the portion of the Petition arguing that a conflict exists on the issue of whether summary judgment is appropriate in secondary effects cases, the County says:

> In applying *Alameda Books*, at least two circuits have concluded, contrary to the panel's decision, that evidentiary challenges on the grounds advanced below do not preclude summary judgment in favor of a municipality's secondary effects record.

Petition, at 16.

According to the Petition, there is a conflict between the Eleventh Circuit, holding that summary judgment cannot be used to determine the constitutionality of a secondary effects ordinance, and decisions from the Seventh and Eighth Circuits, holding that summary judgment is still available. This conflict, argues Manatee County, must be resolved by this Court right now. The cases allegedly in conflict with the opinion in this case are *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003) and *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003).

Once again, the County finds conflicts that do not exist. The Petition avoids any mention of significant factual differences between the ordinances involved in the three cases. Those differences should preclude review by this Court on a "conflict" theory.

A. There is no conflict between the decision in this case and the Seventh Circuit's decision in *G.M. Enterprises*.

The County does not point out the significant factual difference between the ordinance considered in *G.M. Enterprises* and Ordinance 99-18, reviewed in this case. In *G.M. Enterprises*, the public nudity ordinance required entertainers in adult cabarets to wear "pasties and G-strings." 350 F.3d at 636. That was the restriction approved by this Court in *Barnes* and in *City of Erie v. Paps A.M.*, 529 U.S. 277 (2000). But that was not the factual situation the Eleventh Circuit found in this case. Ordinance 99-18 requires much more covering than pasties and G-strings.[13] Whether the evidence before the County will be eventually found to be sufficient to justify this expansion of what this Court approved in *Barnes* and *Paps*, or whether the evidence will be insufficient to advance the proposition advanced by the County, must await the trial below. But because of this very material factual difference between *G.M. Enterprises* and this case, there is no conflict necessitating this Court's intervention.

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13. The public nudity ordinance is set out in full in note 2 of the Eleventh Circuit opinion. App. B at 7a-8a.

B. Likewise, there is no conflict between the Eleventh Circuit's opinion and the opinion in *SOB, Inc.* that requires review by this Court.

The other case cited as being in conflict was *SOB, Inc. v. County of Benton*. The first observation Respondents make is that *SOB* does not involve a summary judgment. That case came to the Eighth Circuit following the denial of a permanent injunction after a trial on the merits. SOB had applied for a preliminary injunction, but the trial court consolidated the application with the trial on the merits, under Fed. R. Civ. P. 65(a)(2). That procedure affords both parties a full evidentiary presentation and cross-examination of the evidence presented by the other party. Thus, when the case arrived at the circuit court it had a fully developed record and a final judgment derived from that record.

In this case, the Eleventh Circuit has remanded the case to the trial court after finding that summary judgment was inappropriate to resolve the evidentiary dispute. It did so in proper reliance on the plurality and concurring opinions in *Alameda Books*. Respondents do not understand how Manatee County can claim that the Eighth Circuit held that summary judgment was an appropriate resolution for an evidentiary dispute.

As the County said in its Petition, the Eighth Circuit did decide in *SOB* that "Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the ordinance. . . ." Whether that was a correct or incorrect decision, it did not involve a trial court judgment without benefit of a trial.

The County also does not point out the significant factual difference between the ordinance considered in *SOB* and

Ordinance 99-18, reviewed in this case. In *SOB*, just as in *G.M. Enterprises*, "The Ordinance compelled Sugar Daddy's female dancers to cover their breasts and genitals with pasties and G-strings while performing." 317 F.3d at 859. But as with the alleged conflict with *G.M. Enterprises*, that was not the factual situation in this case. There cannot be an irreconcilable conflict when the facts are so different.

CONCLUSION

Summary judgment is only appropriate when the evidence before the trial court demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The trial court failed to apply this "black-letter" principle when it ended the procedure below short of trial and granted the County's motion for summary judgment.

This case is not final. The parties are going back to the District Court to determine if Manatee County's rationale was sound and its evidence sufficient. There is no need for this Court to halt that process until it is completed. No conflict in decisions of significant magnitude exists. The Writ should be denied.

Respectfully submitted,

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